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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 39

SEAMPRUFE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 345-352) is reported at 186 F. 2d 671. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 31-70) are reported at 82 NLRB 892.

JURISDICTION

The decree of the court below (R. 353-356) was entered on February 19, 1951. Petitioner's application for rehearing, filed on March 9, 1951 (R.

357-363), was denied on March 19, 1951 (R. 365). The petition for a writ of certiorari was filed on May 1, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether petitioner was denied due process because two unfair labor practice complaints growing out of a single labor dispute—one against petitioner-employer, the other against a union and its agent—were consolidated pursuant to the Board's procedural rules and prosecuted for the Board by one attorney.

2. Whether the Board's findings of fact are supported by substantial evidence on the record considered as a whole.

STATUTE AND RULE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), and of Board Rules and Regulations Series 5, Section 203.33, 12 Fed. Reg. 5660, are set forth in the Appendix, *infra*, pp. 14-16.

STATEMENT

A. *The facts as found by the Board*—Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on April 8, 1949, issued its findings of fact, conclusions of law, and order. The pertinent facts, as

proved by the evidence and found by the Board, may be summarized as follows:[1]

1. Lane, an organizer for the International Ladies Garment Workers' Union (hereinafter called the Union), arrived in McAlester, Oklahoma, on about November 20, 1947, and within the next few days began an organizational campaign among petitioner's employees (R. 40; 224). On November 25, petitioner's plant manager, Baum, called a meeting of all the employees and stated that petitioner had no place for unions (R. 40; 150-151, 169-170, 223, 250-251). Later that day and on the days following, he interrogated numerous employees about their union membership and sympathies (R. 40-41, 43; 151-152, 160, 170-171, 190, 197-198, 252-253, 261-263, 268-269, 280). On December 3, Baum again addressed the employees, promising wage increases and other new benefits (R. 42; 164, 165, 277-278). Shortly thereafter the wage increases became effective (R. 42, 44; 177, 178-179).

In the meanwhile, during the week following Lane's arrival in McAlester, Baum had notified petitioner's officials in New York of her presence (R. 43; 276). Thereupon, Caplin, petitioner's production manager and one of its directors (R. 42; 282), who had not planned to visit McAlester until some time in January (R. 43; 278), advanced the

[1] In this statement, record references preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

date of his visit and addressed the employees on December 9 (R. 42; 284, 286). He repeated Baum's promises and pledged additional benefits (R. 42; 158-159, 165-167, 179-180, 191, 211-212, 278-280, 287).

2. On December 8, Baum, who had been manager of petitioner's plant at Easton, Pennsylvania, before coming to McAlester (R. 40; 250), and who was thoroughly familiar with the Seamprufe Employees Association at Easton (R. 275),[2] suggested to the assembled employees the advantages of forming a similar organization (R. 42, 47; 198, 281, 289-290).[3] To this end, one of the employees posted a notice near the plant time clock, meetings were conducted in the plant within the next ten days, and a Seamprufe Employees Association was formed at McAlester (R. 45; 155, 158, 161, 162-163, 172, 281, 290, 291). The Association's constitution provided for dues of ten cents per week, to be collected by check-off (R. 46; 302, 307, 308). Actually, however, no dues were ever collected and no arrangement beyond the constitutional provision was ever made for their collection (R. 54; 142-143, 289, 291-292, 293).[4]

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[2] This Association, which collected biweekly dues of ten cents checked off by petitioner, held social affairs and sent gifts to sick members (R. 275).

[3] Baum had previously made the same suggestion to several employees individually (R. 40-42; 152-153, 170-171, 191).

[4] The Association had never acquired any funds except for ten dollars earned at a social it sponsored and which its president still carried on her person at the time of the Board's hearing (R. 292-293, 296). No bills had been paid (R. 293)

The meetings of the Association in the plant were held with Baum's permission and he was present in the plant during each meeting (R. 45, 46; 156, 162, 173, 281). Members of the Association campaigned generally in its behalf in the plant on company time (R. 46; 181-184, 189). On one occasion, Baum stood nearby, watching and listening, while an employee campaigning for the Association interrupted another employee at her work and sought to persuade her that petitioner would leave town if the Union succeeded in organizing the plant, warning that petitioner would rather lose $50,000 than have the Union tell it what to do. Baum did not disavow the threat (R. 46-47; 184-188, 248-249). Some time later, when two employees who were officers of the Union local asked him for an increase in the piece rates, Baum replied that he could make no change then but that when "everything was settled and the Association got in," the rates would be corrected (R. 48; 192-193, 194-195).

3. Petitioner hired Virginia Webb on November 24, 1947 (R. 48; 213). The following day she encountered considerable difficulty in her work because of mechanical defects in her machine of which Baum was aware (R. 49; 215-217, 237-238, 240, 243-244, 245, 246-247, 249). After she was transferred to another machine, Baum compli-

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although substantial obligations had been incurred (R. 147, 295, 296, 297, 298). No minutes of any Association meetings had ever been kept (R. 147, 295).

mented her on her progress (R. 49; 217, 218, 266-267). At the conclusion of work that day, Webb left the plant in a cab with Union Organizer Lane, observed by Baum (R. 41, 49; 152, 171, 197, 218, 225-226). On November 26, finding that her original defective machine had been reassigned to her, she reported the matter to her supervisor. Shortly thereafter she was called into Baum's office where Baum discharged her, saying he did not believe that she wanted to work (R. 49; 217, 242). Her supervisor followed her back to the cloakroom and told her she did not know the reason for the discharge (R. 49; 217, 242-243).[5]

Edna Clendenon was hired on October 24, 1947 (R. 50; 195). She worked three days as a machine operator and then became an inspector (R. 50; 196). She was one of the employees interrogated by Baum regarding her union sympathies; at the same time, Baum told her he had heard she was "for" the Union and warned her to be sure she knew what she was doing (R. 41, 50; 197-198, 268-269). During the period she was employed as an inspector she filled in as a sewing machine operator

[5] Webb's supervisor recalled telling Webb on the day of her discharge that her work was improving (R. 244). She also testified that she did not recommend Webb's discharge (R. 245).

The head supervisor testified that it frequently takes longer than six weeks to determine whether an employee will prove competent (R. 49; 235). Caplin admitted stating in his speech that "when we hire a girl we give her 13 weeks to meet her goal," and that those who proved incapable of becoming machine operators need not worry because other work would be found for them (R. 49; 286-287).

when necessary (R. 51; 199, 269). None of the other inspectors ever did that work (R. 51; 208, 269). She was discharged on January 2, 1948, by the head supervisor who told her only that her services were no longer needed (R. 51; 200, 202, 231, 234).

B. *Proceedings before the Board*—In January, 1948, unfair labor practice charges were filed with the Board by the Union against petitioner (R. 21-23) and by petitioner against "Mavis Lane, Representative of the International Ladies Garment Workers Union" (R. 12-14).[6] Complaints were issued on both charges and the cases were ordered to be consolidated pursuant to Section 203.33 (b) of the Board's Rules and Regulations, Series 5 (Appendix, *infra,* p. 16), one attorney being assigned to represent the Board in the consolidated proceedings (R. 14-16, 23-29, 30, 31).

The Board found that both petitioner and Union Organizer Lane had violated the Act. (The Board's finding and order against Lane (R. 63-70), of only incidental relevance here, are sufficiently summarized in note 6 below. As to petitioner, the Board concluded: (1) that it had interfered with,

[6] Petitioner's charges were based on threats Lane had made to some of petitioner's employees during her organizing campaign. Although the complaint issued on these charges named "Mavis Lane *and* International Ladies Garment Workers Union" (R. 14; italics added), the Board approved the trial examiner's finding that the charges were directed only against Lane and affirmed his dismissal of the complaint against the Union (R. 63). Lane herself was found to have violated Section 8 (b) (1) (A) of the Act and an appropriate order was issued against her (R. 63-64, 66-68, 70).

restrained, and coerced its employees, violating Section 8 (a) (1) of the Act, by its offers of a wage increase and other benefits significantly timed to coincide with the Union's campaign and by interrogating its employees concerning their membership in or sympathy with the Union (R. 44-45, 55, 62-63). (2) That by recommending formation of the Association, by permitting Association meetings in the plant, by failing to disavow known threats discouraging membership in the Union, by conditioning wage increases upon the success of the Association, and by the entire course of its conduct in violation of Section 8 (a) (1), petitioner had contributed support to the Association in violation of Section 8 (a) (2) (R. 48, 62). (3) That petitioner had discharged Webb and Clendenon for union activities, violating Section 8 (a) (3) (R. 50, 51, 62-63).

The Board's order (R. 64-66, 68-69) requires cessation of petitioner's unfair labor practices, reinstatement of the wrongfully discharged employees with back pay, and the posting of appropriate notices.

C. *Proceedings in the Court of Appeals*—In granting enforcement of the Board's order against petitioner,[7] the court below pointed out that the Board's attorney represented the Board, not the private parties, and held that his designation to

[7] The order against the Union's organizer, Lane, was also enforced (R. 346-349).

handle both cases was a proper exercise of the Board's discretion (R. 351-352). Secondly, having conducted an "examination of the entire record" (R. 349), the court held that the Board's order was supported by substantial evidence (R. 352). A petition for rehearing (R. 357-363), urging that the standard of review prescribed by Section 10 (e) of the Act as construed by this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, had not been applied by the court, was denied (R. 365).

ARGUMENT

1. As the short and plainly correct answer of the court below makes clear (R. 351-352), petitioner's claim that it was denied due process because the General Counsel assigned one attorney to prosecute the two consolidated complaints rests upon an obvious misconception. The General Counsel and the attorney he designated acted neither for petitioner nor for the Union or its organizer, but "on behalf of the Board" (Section 3 (d) of the Act, *infra,* p. 14), which "asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 364. It was this public right which was vindicated when both petitioner and the Union organizer were found to have committed, and ordered to cease, unfair labor practices. It is for the economical and expeditious per-

formance of its public duty that the Board has adopted the rule, appropriately applied in this case involving a single labor dispute, that proceedings in the same region may be consolidated whenever "the General Counsel deems it necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay * * *." Rules and Regulations, Series 5, Section 203.33 *infra*, p. 16 [8]

That petitioner was in no way prejudiced by the designation of one Board attorney to handle both complaints is amply demonstrated by the absence of any concrete suggestion of injury in the petition for certiorari itself.[9] Throughout the Board's proceedings, petitioner was represented by its own counsel (R. 31, 73). Thus, despite its vigorous invocation of due process, petitioner was never misled by its own fallacious contention that it was a "client" of the Board. "Due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties." *Market St. Ry.*

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[8] Board's Rules and Regulations, Series 6, effective March 1, 1951, continue the consolidation provision involved here in Section 102.33, 16 Fed. Reg. 1934, 1940.

[9] Petitioner's statement (Pet. 4) that the Board's attorney "presented the case against the Union and Mavis Lane after having consulted with Seamprufe's [petitioner's] witnesses regarding Seamprufe's charge" merely illustrates petitioner's refusal to recognize that Board proceedings are not private litigation. Witnesses interviewed by the Board's attorney in preparing the Board's case against the Union and its agent were "Seamprufe's" only in the vague and inapposite sense that Seamprufe presumably hoped the Board would sustain its charge.

Co. v. *Railroad Comm'n.*, 324 U. S. 548, 562. And see *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333, 351; *Lisenba* v. *California*, 314 U. S. 219, 236. There is no hint here of the kind of substantial issue which would warrant review by this Court.

2. Equally without substance is petitioner's contention (Pet. 6-11) that the court below unduly limited the scope of its review and should have reversed the Board's findings as being unsupported "by substantial evidence on the record considered as a whole * * *." Section 10 (e) of the Act, *infra*, p. 15. Following its practice in prior cases (see *National Labor Relations Board* v. *Continental Oil Co.*, 179 F. 2d 552, 555 (C. A. 10)), the court reached its conclusion as to the substantiality of the evidence in this case after an "examination of the entire record" (R. 349). As it has since pointed out in considering this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, the court has "always recognized [its] ultimate responsibility for the rationality of the Board's decision * * *." *National Labor Relations Board* v. *Tri-State Casualty Insurance Co.*, 188 F. 2d 50, 52-53.

It is apparent, then, that the court below is among those which "have always applied the attitude reflected in" the review provisions of the Administrative Procedure Act and Taft-Hartley Act. *Universal Camera Corp.* v. *National Labor*

Relations Board, supra, at 490. Here too, "it is clear from the court's opinion in this case [and from its denial of the petition for rehearing, which urged a conflict with this Court's supervening decision in *Universal Camera*] that it in fact did consider the 'record as a whole,' and did not deem itself merely the judicial echo of the Board's conclusion." *Id.,* at 491. We submit, therefore, that since the Board's findings are plainly supported by the record considered as a whole (see pp. 3-7, *supra*), there is no occasion for further consideration by this Court of "a question which Congress has placed in the keeping of the Courts of Appeals." *Ibid.* Nothing in the record or in the petition for certiorari indicates even remotely that this is "the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Ibid.*

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1951.

APPENDIX

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 151, *et seq.*), are as follows:

Sec. 3. * * *

* * * * *

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. * * * He shall have final authority, on behalf of the Board, * * * in respect of the prosecution of * * * complaints before the Board * * *.

* * * * *

Sec. 6. The Board shall have authority from time to time to make, amend, and rescind * * * such rules and regulations as may be necessary to carry out the provisions of this Act.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *;

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *.

* * * * *

Sec. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred * * * for the enforcement of such order * * *. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or cer-

tification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Section 203.33 of the Board's Rules and Regulations, Series 5, 12 Fed. Reg. 5660, provided in pertinent part (see note 8, p. 10, *supra*):

> Whenever the General Counsel deems it necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay, he * * * may, at any time after a charge has been filed with a Regional Director pursuant to § 203.10, order that such charge and any proceeding which may have been initiated with respect thereto:
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> * * * * *
>
> (b) Be consolidated with any other proceeding which may have been instituted in the same region * * *.

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